UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE ELECTRONIC BOOKS ANTITRUST LITIGATION	No. 11-md-02293 (DLC) ECF Case
This Document Relates to: ALL ACTIONS	CLASS ACTION

CLASS PLAINTIFFS' REPLY
IN SUPPORT OF MOTION FOR CLASS CERTIFICATION

SUBMITTED UNDER SEAL
Pursuant to Protective Order

TABLE OF CONTENTS

I. INTRODUCTION 1

II. ARGUMENT 2

A. Apple Distorts the Holdings in *Comcast* and *Dukes* to Artificially Raise the Bar to Class Certification Beyond Reach 2

1. Comcast Did Not Hold that a Defendant May Defeat Class Certification by Hypothesizing that Most – But Not All – Class Members Were Injured 3

2. Econometric Analysis Based on Averaged and Aggregated Data Is an Indispensable Tool, Not Impermissible "Trial-By-Formula" 7

B. Price-Fixing Conspirators Are Not Entitled to Offset Other Purchases Against Supracompetitive Overcharges 10

C. Apple Offers Experts in "Reality Distortion Field" to Criticize Dr. Noll 11

D. Ascertainability, Manageability and Adequacy Requirements Are Satisfied 14

III. CONCLUSION 15

TABLE OF AUTHORITIES

CASES

Allen v. Dairy Farmers of Am.,
2012 WL 5844871 (D. Vt. Nov. 19, 2012)....................11

Butler v. Sears, Roebuck & Co.,
727 F.3d 796 (7th Cir. 2013)....................4, 9, 5

Butto v. Collecto Inc.,
290 F.R.D. 372 (E.D.N.Y. 2013)....................3

Carrera v. Bayer Corp.,
727 F.3d 300 (3d Cir. 2013)....................13

Chamberlan v. Ford Motor Co.,
402 F.3d 952 (9th Cir. 2005)....................14

Coleman v. Gen. Motors Acceptance Corp.,
220 F.R.D. 64 (M.D. Tenn. 2004)....................15

Comcast Corp. v. Behrend,
_U.S._, 133 S. Ct. 1426 (2013)....................*passim*

Daniel v. Am. Bd. of Emer. Med.,
269 F. Supp. 2d 159 (W.D.N.Y. 2003)....................4, 14

Daubert v. Merrell Dow Pharms.,
509 U.S. 579 (1993)....................1, 10, 11

DG ex rel. Stricklin v. Devaughn,
594 F.3d 1188 (10th Cir. 2010)....................4

Ellis v. Costco Wholesale Corp.,
285 F.R.D. 492 (N.D. Cal. 2012)....................8

Feder v. Elec. Data Sys. Corp.,
429 F.3d 125 (5th Cir. 2005)....................14

Feinstein v. Firestone Tire & Rubber Co.,
535 F. Supp. 595 (S.D.N.Y. 1982)....................15

Freeland v. AT&T Corp.,
238 F.R.D. 130 (S.D.N.Y. 2006)....................10

Friedman v. Dollar Thrifty Auto. Group., Inc.,
2013 WL 5448078 (D. Colo. Sept. 27, 2013)....................5

Gomez v. Tyson Foods, Inc.,
2013 U.S. Dist. LEXIS 141750 (D. Neb. Oct. 1, 2013) 4, 9

Gooch v. Life Inv. Ins. Co. of Am.,
672 F.3d 402 (6th Cir. 2012) 15

Gunnells v. Healthplan Servs., Inc.,
348 F.3d 417 (4th Cir. 2003) 15

Hanover Shoe, Inc. v. United Shoe Mach. Corp.,
392 U.S. 481 (1968)....................10, 11

Hickory Secs. Ltd. v. Repub. of Arg.,
493 F. Appx. 156 (2d Cir. 2012)....................8

In re Amaranth Natural Gas,
269 F.R.D. 366 (S.D.N.Y. 2010) 4, 5

In re Auction Houses Antitrust Litig.,
193 F.R.D. 162 (S.D.N.Y. 2000) 4

In re Blood Reagents Antitrust Litig.,
283 F.R.D. 222 (E.D. Pa. 2012)....................9, 10

In re Cardizem CD Antitrust Litig.,
200 F.R.D. 297 (E.D. Mich. 2001) 4

In re Cathode Ray Tube (CRT) Antitrust Litig.,
2013 WL 5391159 (N.D. Cal. Sept. 19, 2013) 4, 5

In re Chocolate Confectionary Antitrust Litig.,
289 F.R.D. 200 (M.D. Pa. 2012)....................4, 9

In re Currency Conversion Fee Antitrust Litig.,
264 F.R.D. 100 (S.D.N.Y. 2010) 4

In re High-Tech. Emp. Antitrust Litig.,
2013 WL 5770992 (N.D. Cal. Oct. 24, 2013)....................8, 9

In re K-Dur Antitrust Litig.,
2008 WL 2699390 (D.N.J. Apr. 14, 2008) 4

In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig.,
209 F.R.D. 323 (S.D.N.Y. 2002) 15

In re N.W. Airlines Corp. Antitrust Litig.,
208 F.R.D. 174 (E.D. Mich. 2002) 4

In re NASDAQ Market-Makers Antitrust Litig.,
169 F.R.D. 493 (S.D.N.Y. 1996) 4

In re Nexium (Esomeprazole) Antitrust Litig.,
2013 WL 6019287 (D. Mass. Nov. 14, 2013) 3, 5, 6

In re Nexium (Esomeprazole) Antitrust Litig.,
2013 U.S. Dist. LEXIS 173353 (D. Mass. Dec. 11, 2013) 3, 7, 8

In re Pharm. Indus. Average Wholesale Price Litig.,
582 F.3d 156 (1st Cir. 2009) 8

In re Plastics Additives Antitrust Litig.,
2006 WL 6172033 (E.D. Pa. Dec. 20, 2006) 14

In re Rail Freight Fuel Surcharge Antitrust Litigation.,
725 F.3d 244 (D.C. Cir. 2013) 4, 5, 6

In re Relafen Antitrust Litig.,
346 F. Supp. 2d 349 (D. Mass. 2004) 11

In re Rubber Chems. Antitrust Litig.,
232 F.R.D. 346 (N.D. Cal. 2005) 4

In re Titanium Dioxide Antitrust Litig.,
2013 U.S. Dist. LEXIS 62394 (D.Md. May 1, 2013) 9

In re Univ. Serv. Fund Tel. Billing Practices Litig.,
219 F.R.D. 661 (D. Kan. 2004) 15

In re Urethane Antitrust Litig.,
2013 WL 2097346 (D. Kan. May 15, 2013) 5

In re Urethane Antitrust Litig.,
2013 WL 3879264 (D. Kan. July 26, 2013) 8

In re Vitamin C Antitrust Litig.,
279 F.R.D. 90 (E.D.N.Y. 2012) 15

In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.,
722 F.3d 838 (6th Cir. 2013) 3

Kohen v. Pac. Inv. Mgmt. Co. LLC,
571 F.3d 672 (7th Cir. 2009) 4, 5, 6

L.A. Mem. Coliseum Comm'n v. Nat'l Football League,
791 F.2d 1356 (9th Cir. 1986) 10

Loeb Indus. v. Sumitomo Corp.,
306 F.3d 469 (7th Cir. 2002) 8

McManus v. Sturm Foods, Inc.,
292 F.R.D. 606 (S.D. Ill. 2013) 5

Meijer, Inc. v. Warner Chilcott Holdings Co. III, Ltd.,
246 F.R.D. 293 (D.D.C. 2007)....................4

Messner v. Northshore Univ. HealthSystem,
669 F.3d 802 (7th Cir. 2012) 4, 5, 6

Mims v. Stewart Title Guar. Co.,
590 F.3d 298 (5th Cir. 2009) 4

Minpeco, S.A. v. Conticommodity Servs., Inc.,
676 F. Supp. 486 (S.D.N.Y. 1987) 10

Parko v. Shell Oil Co.,
2013 WL 4721382 (S.D. Ill. Sept. 3, 2013)....................5

Phillips v. Asset Acceptance, LLC,
2013 WL 1568092 (N.D. Ill. Apr. 12, 2013)....................5

Ross v. RBS Citizens, N.A.,
667 F.3d 900 (7th Cir. 2012) 14

Shepherd v. ASI, Ltd.,
2013 WL 6058887 (S.D. Ind. Nov. 18, 2013) 5

Terrill v. Electrolux Home Prods., Inc.,
2013 WL 5603873 (S.D. Ga. Oct. 11, 2013)....................5

The Standard Fire Ins. Co. v. Knowles,
_U.S._, 133 S. Ct. 1345 (2013)....................15

United States v. Apple Inc.,
2013 U.S. Dist. LEXIS 96424 (S.D.N.Y. July 10, 2013) 1, 10, 12

Valentine v. WideOpen West Finance, LLC,
288 F.R.D. 407 (N.D. Ill. 2012)....................15

Wal-Mart Stores, Inc. v. Dukes,
_U.S._, 131 S. Ct. 2541 (2011).................... *passim*

Wyatt v. Philip Morris USA, Inc.,
2013 WL 4046334 (E.D. Wis. Aug. 8, 2013)....................5

FEDERAL RULES

Federal Rule of Civil Procedure 23 ....3, 5, 14

I. INTRODUCTION

Every expert during the liability phase who opined whether the conspiracy elevated the Publisher Defendants' e-book prices said yes – full stop. The estimated average total overcharge ranged between 16.8 percent and 19 percent,[1] with the Court finding e-book prices increased on average by 18.6 percent.[2] The conspiracy raised prices for the Publisher Defendants' entire catalog of e-books – both front and back list.[3] Nevertheless, Apple claims Dr. Noll's opinion that the conspiracy raised e-book prices by nearly 20 percent (18.1 percent using transaction-by-transaction analysis), across nearly 100 percent of sales is so unreliable that it may not support class certification or be presented to the jury. But even Apple's recently produced individual customer identification records hammer home the reliability of Dr. Noll's opinions (and speciousness of Apple's arguments). Apple's own data demonstrate at least 99.8 percent of iBookstore customers who bought an e-book from the Publisher Defendants paid an overcharge.[4]

The burden at class certification is not so high as to be insurmountable – as Apple would have the Court find. Dr. Noll employed the most robust data set and modeling approach of any other expert to date. It is remarkable that Apple's current experts fault Dr. Noll for using ***too many publishers*** in his control group and ***too long of a time period*** – when Apple previously criticized Dr. Ashenfelter's model for the exact opposite reasons.[5] Dr. Noll's regression model is a form of common proof to demonstrate injury and damages accepted in scores of antitrust class

---

[1] Declaration of Steve W. Berman in Further Support of Class Plaintiffs' Motion for Class Certification and *Daubert* Motions ("Berman Declaration"), Ex. 1 at 1493:18-1494:4; Ex. 2 at 53, 66 Ex. 3 at 2298:21-24 Ex. 4 at 1, ¶ 3(d). All exhibit references are to the Berman Declaration, unless otherwise noted.

[2] *United States v. Apple Inc.*, No. 12 Civ. 2826, 2013 U.S. Dist. LEXIS 96424, at *110 (S.D.N.Y. July 10, 2013).

[3] *Id.* at *110-*111.

[4] Reply Declaration of Roger G. Noll ("Noll Reply Report") at 39-40, filed concurrently herewith.

[5] Ex. 5 at 2263:8-2265:8; Ex. 6, ¶¶ 16, 17, 37; Ex. 7, ¶¶ 24a, 7.

actions. Even Apple's expert, Dr. Kalt, admits Plaintiffs could apply Dr. Noll's model to individual customer records and calculate whether, and by how much, each class member was overcharged for each e-book title he or she purchased.[6] And Dr. Noll responds to Apple's criticism that by using four week average prices for sales of each title his model obscures the actual number of transactions that do not have an associated overcharge and provides an unreliable damages estimation. To directly test this attack, Dr. Noll re-ran his regression model and treated each transaction as a single observation. Dr. Noll used a super-computer to handle tractability problems due to the enormous data set and processing demands of doing so.[7] The estimation of total damages differs by only 9 percent ($307 million compared to $280 million). At day's end, Apple does not come close to showing Dr. Noll's econometric model is incapable of showing wide-spread injury and a just and reasonable estimation of damages.

II. ARGUMENT

A. Apple Distorts the Holdings in *Comcast* and *Dukes* to Artificially Raise the Bar to Class Certification Beyond Reach

Apple's argument is a form of circularity designed to defeat class certification by definition. First, Apple uses *Comcast*[8] and *Dukes*[9] to fabricate the hull of its argument that common proof of widespread antitrust injury is only established after proving that ***every single class member*** has been damaged and to do so Plaintiffs can not use averages or aggregation. Second, from this flawed premise, Apple's experts deconstruct Dr. Noll's model to argue not all ***individual transactions*** necessarily were sold at a supra-competitive price. And then to complete

[6] Ex. 8, 276:5-277:5.

[7] Noll Reply Report at 16-17.

[8] *Comcast Corp. v. Behrend*, _U.S._, 133 S. Ct. 1426 (2013). All internal citations and quotations omitted and all emphasis added, unless otherwise noted.

[9] *Wal-Mart Stores, Inc. v. Dukes*, _U.S._, 131 S. Ct. 2541 (2011).

the circle, Apple asserts Plaintiffs cannot refute Apple's claims that some individuals may not have been injured because to do so would require individual inquiry, thereby violating the very purpose of the class action device. Apple's argument, if accepted, would be a template for defeating every conceivable class action.

Apple's suggestion that *Comcast* and *Dukes* create this template by rejecting decades of settled case law is wrong.[10] Cases decided after *Dukes* and *Comcast* confirm long-settled legal principles detailed in Plaintiffs' opening brief, and Dr. Noll's methods for showing class-wide injury and damages meet the "rigorous analysis" standard required by Rule 23.[11]

1. Comcast Did Not Hold that a Defendant May Defeat Class Certification by Hypothesizing that Most – But Not All – Class Members Were Injured

Comcast did not re-define class certification requirements so that evidence is deemed "common" only if it establishes antitrust injury ***as to every single transaction***, for every class member.[12] Rather *Comcast* "turn[ed] on the straightforward application of class certification principles"[13] and was "premised on existing class-action jurisprudence."[14] The expert model in *Comcast* was inadequate because it calculated damages indiscriminately for ***four*** different

---

[10] Defendant Apple Inc.'s Memorandum of Law in Opposition to Plaintiffs' Motion for Class Certification ("Apple Opp'n") at 5, Nov. 15, 2013, ECF No. 443.

[11] *See, e.g.*, *Butto v. Collecto Inc.*, 290 F.R.D. 372, 380 (E.D.N.Y. 2013) ("[M]any courts have implicitly harmonized the idea of a liberal approach [to class certification] and a rigorous analysis.").

[12] *In re Nexium (Esomeprazole) Antitrust Litig*., No. 12-md-02409 , 2013 U.S. Dist. LEXIS 173353, at *40 (D. Mass. Dec. 11, 2013) ("*Nexium II*") (emphasizing "that the presence of uninjured class members is not fatal to class certification").

[13] *Comcast*, 133 S. Ct. at 1433; *see also id.* at 1436 ("[T]he opinion breaks no new ground on the standard for certifying a class action under Federal Rule of Civil Procedure 23(b)(3).") (Ginsburg & Breyer, JJ., dissenting).

[14] *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 722 F.3d 838, 860 (6th Cir. 2013); *see also, e.g.*, *In re Nexium (Esomeprazole) Antitrust Litig. ("Nexium I")*, No. 12-md-2409, 2013 WL 6019287, at *14 (D. Mass. Nov. 14, 2013) ("*Comcast* has not changed the rule on what is required for damages models in establishing Rule 23(b)(3) predominance.").

theories of liability, when only ***one*** theory of liability was allowed to proceed to trial.[15] The holding was simple: "a model purporting to serve as evidence of damages in [a] class action must measure only those damages attributable to that theory."[16] Apple does not claim Dr. Noll's model finds injury or measures damages for other wrongdoing or theories of liability.

Nevertheless, Apple tries to alter the code in *Comcast's* actual holding by using a single line of dicta from *In re Rail Freight Fuel Surcharge Antitrust Litigation.*[17] In passing, the D.C. Circuit wrote "plaintiffs must . . . show that they can prove, through common evidence, that all class members were in fact injured by the alleged conspiracy."[18] But this generic statement in *Rail Freight* does not (and cannot) reverse the long line of cases certifying classes, even if "some of the class members probably were net gainers from the alleged" misconduct.[19] Because it is

[15] *Comcast*, 133 S. Ct. at 1430.

[16] *Id.* at 1433; *see also, e.g., Butler v. Sears, Roebuck & Co.*, 727 F.3d 796, 800 (7th Cir. 2013) ("Unlike the situation in *Comcast*, there is no possibility in this case that damages could be attributed to acts of the defendants that are not challenged on a class-wide basis."); *Gomez v. Tyson Foods, Inc.*, No. 08-cv-21, 2013 U.S. Dist. LEXIS 141750, at *15 (D. Neb. Oct. 1, 2013) ("The *Comcast* holding is not applicable to this case because the plaintiffs proceeded on only one theory of recovery and damages were attributable to that theory."); *In re Cathode Ray Tube (CRT) Antitrust Litig.*, No. 07-cv-5944, 2013 WL 5391159, at *7 (N.D. Cal. Sept. 19, 2013) (*Comcast* not applicable where "Defendants do not contend that [plaintiffs' expert's] damages analyses are not tied to [plaintiffs'] single theory.").

[17] 725 F.3d 244 (D.C. Cir. 2013).

[18] *Id.* at 252.

[19] *Kohen v. Pac. Inv. Mgmt. Co. LLC*, 571 F.3d 672, 678 (7th Cir. 2009); *see also, e.g., Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 825-26 (7th Cir. 2012); *DG ex rel. Stricklin v. Devaughn*, 594 F.3d 1188, 1198 (10th Cir. 2010); *Mims v. Stewart Title Guar. Co.*, 590 F.3d 298, 308 (5th Cir. 2009); *In re Chocolate Confectionary Antitrust Litig.*, 289 F.R.D. 200, 222 n.30 (M.D. Pa. 2012); In re Flonase Antitrust Litig., 284 F.R.D. 207, 226-27 (E.D. Pa. 2012); *In re Amaranth Natural Gas*, 269 F.R.D. 366, 382 (S.D.N.Y. 2010); *In re Currency Conversion Fee Antitrust Litig.*, 264 F.R.D. 100, 117 (S.D.N.Y. 2010); *In re K-Dur Antitrust Litig.*, No. 01-cv-1652, 2008 WL 2699390, at *18 (D.N.J. Apr. 14, 2008) aff'd, 686 F.3d 197 (3d Cir. 2012); *Meijer, Inc. v. Warner Chilcott Holdings Co. III, Ltd.*, 246 F.R.D. 293, 310 (D.D.C. 2007); *In re Rubber Chems. Antitrust Litig.*, 232 F.R.D. 346, 353 (N.D. Cal. 2005); *Daniel v. Am. Bd. of Emer. Med.*, 269 F. Supp. 2d 159, 189-90 (W.D.N.Y. 2003); *In re N.W. Airlines Corp. Antitrust Litig.*, 208 F.R.D. 174, 223 (E.D. Mich. 2002); *In re Auction Houses Antitrust Litig.*, 193 F.R.D. 162, 167 (S.D.N.Y. 2000); *In re NASDAQ Market-Makers Antitrust Litig.*, 169 F.R.D. 493, 523 (S.D.N.Y. 1996).

"almost inevitable" that a class will include some members who escaped injury,[20] "[c]ourts have routinely observed that the inability to show injury as to a few does not defeat class certification where the plaintiffs can show widespread injury to the class."[21] As Judge Posner explained, certification should be granted unless the proposed class "contains a ***great many*** persons who have suffered no injury at the hands of the defendant."[22] Critically, it is not enough to show that some individuals *were not* harmed to defeat class certification, but that a great many persons "*could not* have been harmed" – for example, because they had contracts protecting them from price increases.[23] To Plaintiffs' knowledge, every court that has had occasion to reconsider this rule since *Comcast* has reaffirmed it.[24] To interpret the necessary showing of widespread injury at class certification to require class members to demonstrate that every single individual transaction resulted in an overcharge would by definition transform a class action back into a series of thousands or millions of individual inquiries. Of course this is the paradox Apple tries to create. But this interpretation of Rule 23 would read out all efficiencies; by definition it would eviscerate Rule 23(b)(3) cases.

An examination of *Rail Freight* does not support Apple's draconian standard. There,

---

[20] *Kohen*, 571 F.3d at 677.

[21] *In re Cardizem CD Antitrust Litig.*, 200 F.R.D. 297, 320-21 (E.D. Mich. 2001).

[22] *Kohen*, 571 F.3d at 677.

[23] *Messner*, 669 F.3d at 824-25; *accord, e.g.*, *Amaranth*, 269 F.R.D. at 382; *cf. Rail Freight*, 725 F.3d at 248, 252 (vacating class certification where model showed damages for class members with legacy contracts who ***could not*** have been injured).

[24] *See Nexium I*, 2013 WL 6019287, at *10-*11; *Shepherd v. ASI, Ltd.*, No. 12-cv-00167, 2013 WL 6058887, at *3 (S.D. Ind. Nov. 18, 2013); *Terrill v. Electrolux Home Prods., Inc.*, No. 108-cv-030, 2013 WL 5603873, at *5 (S.D. Ga. Oct. 11, 2013); *Friedman v. Dollar Thrifty Auto. Group., Inc.*, No. 12-cv-2432, 2013 WL 5448078, at *3 (D. Colo. Sept. 27, 2013); *CRT*, 2013 WL 5391159, at *5-*6; *Parko v. Shell Oil Co.*, No. 12-cv-336, 2013 WL 4721382, at *5 (S.D. Ill. Sept. 3, 2013); *McManus v. Sturm Foods, Inc.*, 292 F.R.D. 606, 617 (S.D. Ill. 2013); *Wyatt v. Philip Morris USA, Inc.*, No. 09-cv-0597, 2013 WL 4046334, at *3 (E.D. Wis. Aug. 8, 2013); *In re Urethane Antitrust Litig.*, No. 04-md-1616, 2013 WL 2097346, at *2, *6 (D. Kan. May 15, 2013); *Phillips v. Asset Acceptance, LLC*, No. 09-cv-7993, 2013 WL 1568092, at *6 (N.D. Ill. Apr. 12, 2013), *rev'd on other grounds*, No. 13-2251, 2013 WL 6223572 (7th Cir. Dec. 2, 2013).

plaintiffs' expert specified a model that showed injury to shippers who ***could not have been*** injured. These shippers were subject to legacy contractual prices established ***before*** the conspiracy that continued during the conspiracy.[25] The D.C. Circuit concluded the expert's model was not reliable common proof of antitrust injury because the model showed similar overcharges for both competitively established prices and allegedly restrained prices due to the conspiracy.[26] *Rail Freight* did not disavow *Messner*. It actually cited it in the very paragraph quoted by Apple.[27] Apple's attempt to paint *Rail Freight* as breaking from long-settled precedent (and Apple's sleight-of-hand in attributing that supposed rule to *Comcast*)[28] thus fails.

Apple nowhere claims Dr. Noll's model shows e-book prices established pursuant to the wholesale model produce similar overcharge results as e-book prices established under the agency model. Instead, Apple uses Dr. Kalt to craft a theoretical narrative to argue only that some small percentage of the total agency model e-book transactions during the conspiracy may not have sold at supra-competitive prices. Apple's "showing" does not defeat class certification.[29] Quite the contrary, at most this is a dispute between two competing experts over the amount of damages. And if anything, Dr. Kalt's use of Dr. Noll's model to identify transactions Apple claims were sold at or below the "but-for" competitive price demonstrates Dr. Noll's model is perfectly capable of isolating those purchases that Apple argues should be

[25] *Rail Freight*, 725 F.3d at 254.

[26] *Id.* at 252.

[27] *See id.*

[28] *See* Apple Opp'n at 7.

[29] *See Kohen*, 571 F.3d at 678 (defendant bears burden of showing over breadth); *Nexium I*, 2013 WL 6019287, at *9 (defense expert "failed reliably to quantify the prevalence of his alleged problematic subgroups and thus fails to establish that they are sufficiently extensive to undermine [plaintiffs' expert's] conclusions"); *see also, e.g.*, *Messner*, 669 F.3d at 825-26 (vacating denial of class cert where 2.5% of the class apparently "could not have been harmed"); *Nexium I*, 2013 WL 6019287, at *10 (finding common impact exists where 5.8% of consumers were in putative no-damages group).

excluded from the damages calculation. Dr. Kalt did exactly that.[30]

2. Econometric Analysis Based on Averaged and Aggregated Data Is an Indispensable Tool, Not Impermissible "Trial-By-Formula"

Contrary to Apple's claims, "the Supreme Court [in *Dukes*] did not bar the use of averages or aggregate damages measurements in class certification."[31] Notwithstanding, Plaintiffs have gone above and beyond what the law (and reliable econometric methodologies) require. In direct response to Apple's attack on Dr. Noll's regression model for using four-week average prices for each e-book title, Dr. Noll used a supercomputer to solve tractability problems with the enormous data set and re-ran his regression model using *individual transaction level data* for each purchase. The estimated damages changed by only 9 percent from his previous estimates.[32]

Moreover, the approach to distributing individual damages to class members after a jury determines an aggregate damage award against Apple is nothing like the facts in *Dukes*. Here, during the damages distribution phase, Dr. Noll's model will be able to calculate damages for each individual transaction by applying the estimated percentage overcharge to the purchase price for each impacted title the class member purchased.[33] In contrast, in *Dukes,* an employment discrimination case, plaintiffs challenged as discriminatory millions of individual hiring decisions – even though no corporate-wide policy existed to which plaintiffs could tether their claims. Sample cases were proposed to be tried, after which "[t]he percentage of claims

---

[30] Declaration of Joseph P. Kalt, Ph.D. on Behalf of Apple Inc. ("Kalt Decl."), at 73-76, filed under seal on Nov. 15, 2013; Ex. 8 at 137:11-140:2.

[31] *Nexium II*, 2013 U.S. Dist. LEXIS 173353, at *39-40.

[32] Noll Reply Report at 17.

[33] Alternatively, the Court can devise a similar (and simplified) allocation and distribution plan to the one already implemented for the settling defendants. Apple's total liability is unaffected by the plan of allocation and distribution of course. *See* Noll Reply Report at 16.

determined to be valid would then be applied to the entire remaining class, and the number of (presumptively) valid claims thus derived would be multiplied by the average backpay award in the sample set."[34] Under this method, Wal-Mart could not "litigate its statutory defenses to individual claims."[35] Here, by contrast, Apple has been found to have conspired to restrain trade already, and ***Apple pleads no individualized defenses***.[36] Apple's criticisms are legally and/or factually meritless – but if they were correct, they would apply across the class, not individually. Apple is thus receiving every entitlement that it would have at an individual trial.

Apple's unwarranted extension of *Dukes*, if accepted, would nearly always prevent a class from being certified or aggregate damages from being calculated given the mechanics of an econometric analysis. Multiple regression analysis ***by definition*** makes use of averages, and a robust dataset is essential to a reliable estimate of but-for prices.[37] Econometricians rely every day on averaging large datasets to reach scientifically supported conclusions. Indeed, while contesting common impact in a recent antitrust case, Apple's expert (Dr. Kevin Murphy) acknowledged that "averaging aggregate data is an appropriate statistical tool."[38]

As the Second Circuit recently reaffirmed, "[a]ggregate class-wide damages are not *per se* unlawful;" rather, they are permissible so long as they "roughly reflect the aggregate amount

---

[34] *Dukes*, 131 S. Ct. at 2561.

[35] *Id.*

[36] *See* Apple Inc.'s Answer to Consolidated First Amended Class Action Complaint at 31-33, Nov. 4, 2013, ECF No. 435.

[37] *See, e.g.*, Federal Judicial Center, Reference Guide on Multiple Regression 344 (3d ed. 2011) ("Multiple regression . . . is a method in which a regression line is used to relate the average of one variable – the dependent variable – to the values of other explanatory variables."); *Ellis v. Costco Wholesale Corp.*, 285 F.R.D. 492, 523 (N.D. Cal. 2012) (where appropriate, "larger aggregate numbers allow for a robust analysis and yield more reliable and more meaningful statistical results").

[38] *In re High-Tech. Emp. Antitrust Litig.*, No. 11-cv-2509, 2013 WL 5770992, at *41 (N.D. Cal. Oct. 24, 2013).

owed to class members."[39] This principle survives *Dukes* and *Comcast* in full force.[40]

At bottom, Apple's tactic is to point to potential exceptions and variations in damages to claim the class lacks cohesiveness. But requiring the precision of ***perfect symmetry*** would defeat all classes in the real world.[41] Apple mimicked its arguments here in another case recently, claiming that the plaintiffs' expert "should not have relied on averages in his correlation and multiple regression analyses"[42] where "compensation policies and practices were highly individualized with wide variation in compensation [and] compensation was set by hundreds of different managers."[43] Judge Koh correctly rejected this argument.[44] As one post-*Dukes* court observed, *no* court has ever required plaintiffs to estimate "almost a million different but-for

---

[39] *Hickory Secs. Ltd. v. Repub. of Arg.*, 493 F. Appx. 156, 159 (2d Cir. 2012); *see also, e.g.*, *In re Pharm. Indus. Average Wholesale Price Litig.*, 582 F.3d 156, 197-98 (1st Cir. 2009) ("The use of aggregate damages calculations is well established in federal court and implied by the very existence of the class action mechanism itself."); *Loeb Indus. v. Sumitomo Corp.*, 306 F.3d 469, 493 (7th Cir. 2002) ("[I]n complicated antitrust cases plaintiffs are permitted to use estimates and analysis to calculate a reasonable approximation of damages."); Alba Conte & Herbert B. Newberg, 3 Newberg on Class Actions (4th ed. 2002) § 10:2 ("Individual damage issues should not, except in extraordinary situations, have any adverse effect on the propriety of aggregate class judgments as a proper means for determining the defendant's liability to the class. . . . Aggregate proof of the defendant's monetary liability is no more unfair than class treatment of other elements of liability."); *id.* at § 10:5 ("Challenges that such aggregate proof affects substantive law and otherwise violates the defendant's due process or jury trial rights to contest each member's claim individually, will not withstand analysis.").

[40] *See, e.g.*, *Nexium II*, 2013 U.S. Dist. LEXIS 173353, at *41 (finding *Comcast* "does not preclude the use of aggregate damages calculations"); *In re Urethane Antitrust Litig.*, No. 04-md-1616, 2013 WL 3879264, at *2 (D. Kan. July 26, 2013); *In re Titanium Dioxide Antitrust Litig.*, No. 10-cv-318, 2013 U.S. Dist. LEXIS 62394, at *54 (D.Md. May 1, 2013); *Gomez*, 2013 U.S. Dist. LEXIS 131750, at *5-*7; *In re Blood Reagents Antitrust Litig.*, 283 F.R.D. 222, 243 (E.D. Pa. 2012).

[41] *See Butler*, 727 F.3d at 801 ("It would drive a stake through the heart of the class action device . . . to require that every member of the class have identical damages. . . . "[D]efendants would be able to escape liability for tortious harms of enormous aggregate magnitude but so widely distributed as not to be remediable in individual suits.").

[42] *High-Tech.*, 2013 WL 570992, at *41.

[43] *Id.*, at *38.

[44] *Id.*, at *38, *41; *see also id.*, at *48 ("Because Dr. Leamer's model is supported by the economic literature . . . is statistically robust (*i.e.*, insensitive to alternative control variables), and is buttressed by Dr. Leamer's subsequent analysis, the Court finds that Dr. Leamer's model is capable of calculating classwide damages.").

prices"; rather, courts accept the use of a limited number of estimated but-for prices as an acceptable approximation of "variable pricing in the real world."[45] It has long been the rule that "[b]ecause of the practical difficulties in calculating damages based on an illusory 'but-for' world, courts do not require damages to be reduced to a mathematical certainty."[46]

B. Price-Fixing Conspirators Are Not Entitled to Offset Other Purchases Against Supracompetitive Overcharges

Apple also argues that it gets to offset the supra-competitive overcharges against procompetitive effects: cheaper Kindles, free e-books, cheaper e-books from other publishers, and decreases on some of Publisher Defendants' titles. First, these claimed "benefits" are foreclosed by this Court's findings.[47] Second, no court has *ever* "required plaintiffs to account for potential decreases in the price of some products as the result of an alleged horizontal price-fixing conspiracy."[48] Apple's citations do not support its argument. For example, Apple portrays this Court's decision in *Freeland v. AT&T Corp.*[49] to require that a damages analysis for ***any*** antitrust violation consider any offset imagined by the defendant. *Freeland*, however, explicitly considered the limited question of whether the anti-competitive effect of an *illegal tying arrangement* should account for the price of both products or only the tied product.[50] Apple's other citations are similarly off-point, dealing with the cost to the plaintiff of purchasing the

---

[45] *Blood Reagents*, 283 F.R.D. at 243.

[46] *Chocolate Confectionary*, 289 F.R.D. at 222.

[47] *See Apple*, 2013 U.S. Dist. LEXIS 96424, *141-*142. Depending on the Court's rulings on Plaintiffs' *Daubert* motions brought against Apple's experts, Plaintiffs may move *in limine* based on collateral estoppel if any "pro-competitive" opinions still remain.

[48] *Blood Reagents*, 283 F.R.D. at 239.

[49] 238 F.R.D. 130, 149-50 (S.D.N.Y. 2006).

[50] *Compare* Apple Opp'n at 16 ("a consumer whose antitrust injuries are offset 'has suffered no economic harm as a result of the [***antitrust violation***]'") (alteration in original; emphasis added) *with Freeland*, 238 F.R.D. at 149-50 ("There are two basic methods for assessing harm in tying cases. . . . [S]uch a consumer has suffered no economic harm ***as a result of the tying***. . . .").

illegally withheld product in the but-for world,[51] the value of receiving the illegally withheld product by injunctive relief,[52] and plaintiffs holding commodities and corresponding commodities futures as hedges.[53] Indeed, the seminal *Hanover Shoe* explicitly ***rejects*** offsetting benefits in related segments of the market (there, downstream profits).[54]

C. Apple Offers Experts in "Reality Distortion Field" to Criticize Dr. Noll

Dr. Kalt and Mr. Orszag craft a number of arguments to criticize Dr. Noll. They share tactics by distorting or ignoring evidence when it doesn't fit their narrative, feigning confusion about this Court's findings, and failing to employ scientifically reliable economic methods in order to serve their opinions to Apple. As such, Plaintiffs separately move to exclude Dr. Kalt's and Mr. Orszag's opinions under *Daubert*.[55] The following summarizes just a few examples of Dr. Kalt's and Mr. Orszag's unreliable, result-driven analyses.

To criticize Dr. Noll for telling a "just so story,"[56] Dr. Kalt claims the trade e-book market has no pricing structure, hoping to portray the e-book market as a frenzied, competitively unpredictable potpourri of highly varied pricing decisions accompanied by great "dispersion"

---

[51] *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481, 503-504 (1968).

[52] *L.A. Mem. Coliseum Comm'n v. Nat'l Football League*, 791 F.2d 1356, 1374-75 (9th Cir. 1986).

[53] *Minpeco, S.A. v. Conticommodity Servs., Inc.*, 676 F. Supp. 486, 491-92 (S.D.N.Y. 1987); *see also id.* at 490 ("[T]here is no rigid requirement that a plaintiff must always be limited to its net economic injury where such a limitation would be inequitable or contrary to deterrent goals.").

[54] *Hanover Shoe*, 392 U.S. at 492-93 ("Normally the impact of a single change in the relevant conditions cannot be measured after the fact . . . . [I]t is [likely] that if the existence of the defense is generally confirmed, antitrust defendants will frequently seek to establish its applicability. Treble-damage actions would often require additional long and complicated proceedings involving massive evidence and complicated theories."); *see also, e.g.*, *In re Relafen Antitrust Litig.*, 346 F. Supp. 2d 349, 369 (D. Mass. 2004) ("*Hanover Shoe* permits a direct purchaser to recover the 'full amount of the overcharge'. . . even if he is otherwise benefited.").

[55] *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579 (1993).

[56] Kalt Decl. at 65-68.

and "churn."[57] But Dr. Noll details how each of Dr. Kalt's "numerous calculations and conceptual flaws, . . . misrepresent the nature and extent of price variation. . . ."[58] For example Dr. Kalt uses incorrect dates to calculate whether prices went up, down, or stayed the same after the conspiracy took effect. After correcting for Dr. Kalt's errors, the data shows approximately 74.2 percent of these units ***sold at higher prices*** (compared to Dr. Kalt's representations of 34.4 percent) within four weeks of the conspiracy going into effect in April 2010.[59] Also, the Court found 85.7 percent and 92.1 percent of newly released e-books were priced at the top end of the pricing tiers at Amazon and Apple respectively.[60] Yet, Dr. Kalt claims he could not figure out how to calculate these numbers systematically.[61] Dr. Kalt also claims Dr. Noll's hedonic variables (including different categories of e-books) do not adequately capture the variables that explain e-book pricing, such as "buzz."[62] But Dr. Kalt admits he knows nothing about the specific factors publishers use to set prices and ignores a large body of evidence showing the limited variables that the Publisher Defendants use to set prices.[63] And ***eighty percent*** of the Publisher Defendants' sales are accounted for by only ***four percent*** of their titles (demonstrating

---

[57] *Id.*, ¶¶ 62-67. Dr. Kalt used his "dispersion" and "churn" story to try and defeat class certification in *Allen v. Dairy Farmers of Am.*, No 09-cv-0230, 2012 WL 5844871 (D. Vt. Nov. 19, 2012). Ex 8 at 166:22-168:19, 239:6-242:11. The court rejected Dr. Kalt's opinions, skeptically noting Dr. Kalt's track record of universally testifying against class certification that no common method exists to meet the class certification standards. *See Dairy Farmers*, 2012 WL 5844871, at *11 n.10. Dr. Kalt is the Will Rogers of class certification opposition. He testified he never met a class action he did not oppose. Ex. 8 at 171:22-177:21.

[58] Noll Reply Report at 20.

[59] Noll Reply Report at 28-33. By comparison, Random House's average prices did not change immediately after the conspiring publishers switched to agency. Noll Reply Report at 22.

[60] *Apple*, 2013 U.S. Dist. LEXIS 96424, at*109.

[61] Ex.8 at 57:2-60:21.

[62] Kalt Decl. at ¶ 13(a).

[63] Ex. 8 at 287:4-311:21; Noll Reply Report at 7-8.

extremely high concentration of titles affecting sales in the industry).[64] Dr. Kalt also uses unreliable "modal prices" (the least useful measure of central tendency) to show pricing variation and does so inconsistently, without any apparent justification.[65] Dr. Kalt also misleadingly excludes large amounts of data from his correlation analysis that show no price changes between titles over an extended period – evidence of structure – between two titles.[66]

Apple's experts distort reality in several additional ways, including: (1) Mr. Orszag offers "guesstimations" purportedly quantifying procompetitive effects caused by the conspiracy, but he and Dr. Kalt admit under cross-examination they could not use reliable econometrics to estimate the alleged benefits to consumers[67]; (2) Mr. Orszag admits he would need to modify his opinions if this Court "clarified" that when it found the agency agreements had no pro-competitive benefits, the Court really meant what it said[68]; (3) Mr. Orszag omitted from his analysis that the likely outcome in a but-for world would have been Amazon negotiating lower wholesale e-book prices, stating he did so because "he didn't have the data" to analyze the issue[69]; and (4) Mr. Orszag criticizes Dr. Noll for using ***all e-book publishers*** in the trade e-book market as a control group and ***too long*** of a time period of data, even though Apple's expert on liability (Dr. Burtis) criticized Dr. Ashenfelter and Dr. Gilbert for using ***too few publishers*** as a control group and ***too short*** of a time period.[70] Apple's experts have published a "just say anything story" that can be found in the ***fiction section*** of this litigation.

---

[64] Ex. 8 at 214:7-11; Kalt Decl., Fig. 6.

[65] Noll Reply Report at 24-28.

[66] *Id.* at 34-39.

[67] Ex. 8 at 113:8-115:25; Ex. 9 at 204:4-208:19.

[68] Ex. 9 at 191:21-195:8. Mr. Orszag should not be granted a "mulligan."

[69] *Id.* at 284:4-293:10. *See also* Memorandum of Law in Support of Class Plaintiffs' Motion to Exclude the Expert Opinions Offered by Apple's Expert Jonathan Orszag at 16-19.

[70] Ex. 5 at 2263:8-2265:8; Ex. 6 at ¶¶ 16, 17, 37; Ex. 7, ¶¶ 24a, 7.

D. Ascertainability, Manageability and Adequacy Requirements Are Satisfied

Ascertainability. Apple argues Plaintiffs have not shown ascertainability because they have not "provide[d] evidence" that class members are ascertainable.[71] At most, "the plaintiff must demonstrate his purported method for ascertaining class members is reliable and administratively feasible, and permits a defendant to challenge the evidence used to prove class membership."[72] Here, the reliability and administrative feasibility of using retailers' uniquely detailed transactional records is unchallenged (Dr. Kalt admits it is feasible)[73] and supported by the Court's experience with these records to distribute settlements.[74]

Manageability. Apple claims Rule 23(c)(1)(B) requires Plaintiffs to present a "trial plan."[75] But [n]othing in the Advisory Committee Notes suggests grafting a requirement for a trial plan onto [Rule 23]."[76] Rather, a trial plan is considered useful by some courts.[77] Plaintiffs will file a formal trial plan if the Court requests. But Apple's description of a trial where the "jury would need to determine which ebooks were purchased by each of the millions of class

---

[71] Apple Opp'n at 8.

[72] *Carrera v. Bayer Corp.*, 727 F.3d 300, 308 (3d Cir. 2013).

[73] Ex. 8 at 275:20-277:5.

[74] *Cf.* Plaintiffs' Consumer Distribution Plan, June 21, 2013 ECF No. 360-7, ¶ B.7.a ("Each Crediting Retailer [including Apple] has identified, in its internal system, all individual customers who purchased qualifying E-books.").

[75] Apple Opp'n at 23-24.

[76] *Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 961 n.4 (9th Cir. 2005); *see also, e.g., Ross v. RBS Citizens, N.A.*, 667 F.3d 900, 905 (7th Cir. 2012), *Vacated on other grounds, remanded*, 133 S. Ct. 1722 (2013) (noting "the Federal Rule's apparent move towards the creation of ***voluntary*** trial plans"); *Feder v. Elec. Data Sys. Corp.*, 429 F.3d 125, 139-40 (5th Cir. 2005) (trial plan not required by Rule 23(b)(3)); *In re Plastics Additives Antitrust Litig.*, No. 03-cv-2038, 2006 WL 6172033, at *2 (E.D. Pa. Dec. 20, 2006); *Daniel*, 269 F. Supp. at 203.

[77] *See* Federal Rules of Civil Procedure 23 advisory committee's note (2003) ("An increasing number of courts require a party requesting class certification to present a 'trial plan' that describes the issues likely to be presented at trial and tests whether they are susceptible of class-wide proof.").

members" and "whether that particular class member received any off-setting benefits"[78] is not a trial plan; it's Apple's argument against a single trial to determine aggregate damages.[79]

Adequacy. Apple argues that Plaintiffs are not adequate class representatives because they are not seeking damages beyond May 21, 2012, the date that the first Publisher Defendants settled with the State Plaintiffs and began terminating their agency agreements. This argument is frivolous. First, "a class action, of course, is one of the recognized exceptions to the rule against claim-splitting."[80] And second, a class representative is only inadequate for declining to seek all possible relief where she is "pursuing relatively insignificant claims while jeopardizing the ability of class members to pursue far more substantial, meaningful claims."[81] That certainly is not the case here.

III. CONCLUSION

Plaintiffs respectfully ask the Court to certify the Class of e-book consumers identified in Plaintiffs' opening brief so that class members have the opportunity to hold Apple accountable.

---

[78] Apple Opp'n at 24.

[79] *Cf. Butler*, 727 F.3d at 801 ("It would hardly be an improvement to have in lieu of this single class 17 million suits each seeking damages of $15 to $30 . . . . The ***realistic*** alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30.") (ellipsis and emphasis in original).

[80] *Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 432 (4th Cir. 2003) (quoting 18 Moore's Fed. Practice § 131.40(e)(3)(iii) (2002)); *accord, e.g., Gooch v. Life Inv. Ins. Co. of Am.*, 672 F.3d 402, 428 n.16 (6th Cir. 2012); *Valentine v. WideOpen West Finance, LLC*, 288 F.R.D. 407, 415 (N.D. Ill. 2012).

[81] *In re Univ. Serv. Fund Tel. Billing Practices Litig.*, 219 F.R.D. 661, 669 (D. Kan. 2004); *see also In re Vitamin C Antitrust Litig.*, 279 F.R.D. 90, 115-16 (E.D.N.Y. 2012) (distinguishing and rejecting *In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig.*, 209 F.R.D. 323 (S.D.N.Y. 2002), on which Apple relies); *Coleman v. Gen. Motors Acceptance Corp.*, 220 F.R.D. 64, 82 (M.D. Tenn. 2004) (discussing *Feinstein v. Firestone Tire & Rubber Co.*, 535 F. Supp. 595 (S.D.N.Y. 1982), on which Apple relies: "These cases are all similarly distinguishable from the case at bar, in that they involved actions where the class representatives had left aside the far stronger claims for monetary damages and sought to have the weaker claims certified, for dubious strategic purposes."); *cf. The Standard Fire Ins. Co. v. Knowles*, _U.S._, 133 S. Ct. 1345, 1349 (2013) (class representatives have duty not to "throw away what could be a ***major*** component of the class's recovery").

DATED: December 18, 2013

HAGENS BERMAN SOBOL SHAPIRO LLP

By ______________________________
STEVE W. BERMAN (*Pro Hac Vice*)

George W. Sampson (GS-8973)
Sean Matt
1918 Eighth Avenue, Suite 3300
Seattle, WA 98101
Telephone: (206) 623-7292
Facsimile: (206) 623-0594
steve@hbsslaw.com
george@hbsslaw.com

Jeff D. Friedman (*Pro Hac Vice*)
Shana Scarlett (*Pro Hac Vice*)
HAGENS BERMAN SOBOL SHAPIRO LLP
715 Hearst Avenue, Suite 202
Berkeley, CA 94710
Telephone: (510) 725-3000
Facsimile: (510) 725-3001
jefff@hbsslaw.com
shanas@hbsslaw.com

Kit A. Pierson (*Pro Hac Vice)*
Emmy L. Levens
Jeffrey Dubner (JD4545)
COHEN, MILSTEIN, SELLERS & TOLL, PLLC
1100 New York Avenue, N.W.
South Tower, Suite 500
Washington, D.C. 20005
Telephone: (202) 408-4600
Facsimile: (202) 408-4699
kpierson@cohenmilstein.com
elevens@cohenmilstein.com
jdubner@cohenmilstein.com

Douglas Richards (JR6038)
COHEN, MILSTEIN, SELLERS & TOLL, PLLC
88 Pine Street, 14th Floor
New York, NY 10005
Telephone: (212) 838-7797
Facsimile: (212) 838-774
DRichards@cohenmilstein.com

Co-Lead Counsel for Plaintiffs